

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

AMERICAN FAMILY MUTUAL INSURANCE) Case No.: 2:10-cv-2090-GMN-RJJ
COMPANY, AMERICAN FAMILY LIFE)
INSURANCE COMPANY, and AMERICAN)
STANDARD INSURANCE COMPANY OF)
WISCONSIN, Wisconsin mutual insurance companies,)
)
Plaintiffs,)
vs.)
JANET BEASLEY, an individual, and INSURANCE)
OUTLET, a Nevada sole-proprietorship,)
)
Defendants.)
)
)
JANET BEASLEY, an individual, and INSURANCE)
OUTLET, a Nevada sole-proprietorship,)
)
Counter-Claimants,)
vs.)
AMERICAN FAMILY LIFE INSURANCE)
COMPANY, AMERICAN FAMILY MUTUAL)
INSURANCE COMPANY, and AMERICAN)
STANDARD INSURANCE COMPANY OF)
WISCONSIN, Wisconsin mutual insurance companies,)
)
Counter-Defendants.)
)

INTRODUCTION

Before the Court is Plaintiffs/Counter-Defendants American Family Mutual Insurance Company, American Family Life Insurance Company, and American Standard Insurance Company of Wisconsin's (hereinafter collectively "American Family") Motion to Strike (ECF

1 No. 13). Defendant/Counter-Claimants Janet Beasley and Insurance Outlet (hereinafter
2 collectively “Beasley”) filed a Response (ECF No. 21). American Family filed a Reply (ECF No.
3 24).

4 Also before the Court is American Family’s Motion to Dismiss Counterclaims (ECF No.
5 14). Beasley filed a Response to the Motion (ECF No. 22), as well as a Counter-Motion for
6 Summary Judgment (ECF No. 23). American Family filed a Reply to its Motion to Dismiss (ECF
7 No. 25) and a Response to the Motion for Summary Judgment (ECF No. 30). Beasley filed a
8 Reply to the Motion for Summary Judgment (ECF No. 31).

9 **FACTS AND BACKGROUND**

10 American Family Mutual Insurance Company, American Family Life Insurance Company,
11 and American Standard Insurance Company of Wisconsin are affiliated insurance companies that
12 sell commercial and personal lines of insurance and securities. (Compl. ¶6, ECF No. 1.) On July
13 1, 2007, American Family entered into an American Family Entity Agent Agreement with Herni
14 Thompson Agency, Inc. (the “Agreement”). (*Id.* at ¶7; Agreement, Ex. A attached to Compl., ECF
15 No. 1). Prior to the Agreement, Herni S Tjong-Thompson (“Thompson”) was an agent of
16 American Family. (Compl. at ¶8). Thompson is the major equity holder and principal and
17 manager of Henri Thompson Agency, Inc. (“Thompson Agency”). (*Id.*).

18 Beasley was an employee of Thompson Agency until at least December 2008. (*Id.* at ¶9.)
19 American Family alleges that Beasley, and others employed by or associated with the Thompson
20 Agency, conspired to defraud and did defraud American Family by manipulating the timing of
21 policy transactions to artificially inflate retention numbers with the aim of increasing quarterly
22 commission bonuses paid by American Family. (*Id.* at ¶10.) American Family alleges that as a
23 result of the inflation and attempts to defraud, the Thompson Agency received commission
24 bonuses that were much higher than what they should have actually received. (*Id.* at ¶¶11–16.) It
25 is alleged that Beasley benefited financially from the inflated bonuses. (*Id.*)

1 The Agreement provides that for one year following the termination of the agreement, the
2 Agent nor any Equity Holder, officer, member or licensed sales representative of the Agent will
3 induce or attempt to induce any policyholder to lapse, cancel, replace or surrender any insurance
4 policy in force with American Family. (*Id.* at ¶19; Agreement at p. 10.) The Agreement also
5 provides that all policy records remain the property of American Family and shall be returned
6 upon the termination of the agreement (Compl. at ¶20; Agreement at p. 5.) The Agreement states
7 that American Family's Customer Information is confidential, should only be used to perform
8 services under the Agreement and should not be disclosed or made available except as necessary
9 to provide services under the Agreement. (Compl. at ¶20; Agreement at pg. 7.)

10 In December 2008, American Family discovered that the employees were artificially
11 inflating their numbers and terminated the Agreement. (Compl. at ¶22–23.) American Family
12 alleges that Beasley, and others, retained copies of customer information from American Family's
13 database and customer files following the termination of their agency with American Family. (*Id.*
14 at ¶25.) American Family further alleges that Beasley began contacting American Family
15 policyholders in an attempt to induce them to lapse, cancel, replace or surrender their American
16 Family insurance policies. (*Id.* at ¶27.) On February 17, 2009, Beasley obtained a business
17 license for Insurance Outlet with the City of Henderson, Nevada, and listed herself as owner. (*Id.*
18 at ¶29.) American Family alleges that Beasley induced at least a dozen American Family
19 policyholders to transfer their insurance business from American Family to Insurance Outlet from
20 February through March 2009. (*Id.* at ¶ 32.)

21 American Family alleges that Beasley has misappropriated trade secrets, tortuously
22 interfered with its contractual relations and business expectations, engaged in unfair competition
23 under Nevada law, been unjustly enriched, engaged in a civil conspiracy and concert of action to
24 commit the unlawful acts, as well as aided and abetted the Thompson Agency in breaching its
25 duties with American Family. (Compl. at ¶¶47–83.)

1 Beasley filed nine counterclaims in conjunction with their Answer. (Errata to Answer
 2 ¶¶14–65, ECF No. 9.) Beasley alleges that it is American Family who is improperly interfering
 3 with its business relationships and has breached its contractual duties. In July 2009¹, American
 4 Family and Beasley entered into a contractual agreement wherein American Family would
 5 provide insurance coverage for personal injury, advertising injury, and other business-related
 6 losses sustained by Beasley (“Insurance Agreement”). (*Id.* at ¶15; Insurance Agreement, Ex. A
 7 attached to Errata to Answer, ECF No. 9–1.) The terms of the Insurance Agreement provided that
 8 American Family would defend and indemnify Beasley for losses such as the ones set forth in
 9 American Family’s Complaint. (Answer at ¶15.) Beasley argues that American Family must
 10 defend and indemnify her and Insurance Outlet in this suit because of the Insurance Agreement.

11 DISCUSSION

12 A. Motion to Strike

13 1. Legal Standard

14 Federal Rule of Civil Procedure 8(b)(1)(B) states that “[i]n responding to a pleading, a
 15 party must: admit or deny the allegations asserted against it by an opposing party.” “A denial
 16 must fairly respond to the substance of the allegation.” Fed. R. Civ. P. 8(b)(2). “A party that
 17 intends in good faith to deny only part of an allegation must admit the part that is true and deny
 18 the rest.” Fed. R. Civ. P. 8(b)(4). An averment in a pleading that this not properly denied is
 19 deemed to be admitted. Fed. R. Civ. P. 8(b)(6). Rule 12(f) of the Federal Rules of Civil Procedure
 20 allows a court to “strike from a pleading an insufficient defense or any redundant, immaterial,
 21 impertinent, or scandalous matter.”

22 2. Analysis

23 American Family motions the Court to strike from Beasley’s Answer a total of 38

24
 25 ¹ The Counterclaim says January 2009 but the Insurance Agreement attached to Beasley’s Errata to Answer and Counterclaims
 has an effective date of July 7, 2009. (See Insurance Agreement, Ex. A attached to Errata to Answer, ECF No. 9–1.)

1 paragraphs where Beasley responded “deny the allegations contained [in 38 paragraphs] as they
 2 call for legal conclusions.” (*See Errata to Answer.*) American Family argues that many other
 3 courts have found that refusing to answer an allegation because it calls for legal conclusions is
 4 improper. *See Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05 C 3520, 2005 WL 2445902, at *2
 5 (N.D. Ill. Sept. 29, 2005) (Refusing to answer an allegation because it calls for legal conclusions
 6 “flies in the face of the established doctrine that legal conclusions are a proper part of federal
 7 pleading, to which Rule 8(b) also compels a response.” (citing *Gracedale Sports and Entm’t., Inc.*
 8 *v. Ticket Inlet, LLC*, No. 99 C 2781, 1999 WL 618991, at *1 (N.D. Ill. Aug. 9, 1999))) . *See also*
 9 *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827 (1989); *Jackson v. Marion County*, 66
 10 F.3d 151, 153–54 (7th Cir. 1995); *Northern Ind. Metals v. Iowa Express, Inc.*, 2:07-cv-414-PRC,
 11 2008 WL 2756330, at *4 (N.D. Ind. July 10, 2008)(Responses that an allegation “is a legal
 12 conclusion” is “insufficient and contrary to the Federal Rules of Civil Procedure.”).

13 Beasley responds that the answers are legitimate responses to American Family’s “legal
 14 conclusions.” However, Beasley does not cite to any authority that allows a party to deny an
 15 allegation because it calls for a legal conclusion. Instead, Beasley only calls into question one of
 16 the cases cited by American Family because the plaintiff in that case was a pro per plaintiff. *See*
 17 *Jackson*, 66 F.3d 151 (7th Cir. 1998). Beasley also argues that the other two cases cited by
 18 American Family do not have any real bearing on this case but does not specifically state why.

19 The Court is persuaded by the cases cited by American Family and finds that it is proper to
 20 Strike the responses by Beasley. Beasley will be given fourteen (14) days to file an Amended
 21 Answer; otherwise the Court will deem admitted all 38 paragraphs that Beasley failed to deny
 22 properly.

23 **B. Motion to Dismiss**

24 American Family also moves to dismiss Beasley’s counterclaims of breach of contract
 25 (count 1), breach of the covenant of good faith and fair dealing (count 2), breach of fiduciary duty

1 (count 3), tortious breach of the covenant of good faith and fair dealing (count 4), and declaratory
 2 relief (count 8). These counts relate to whether or not American Family has a duty to defend
 3 Beasley under the Insurance Agreement.

4 **1. Legal Standard**

5 Nevada courts will give the language of an insurance policy “its plain and ordinary
 6 meaning ‘from the viewpoint of one not trained in law.’” *United Nat'l Ins. Co. v. Frontier Ins.
 7 Co., Inc.*, 99 P.3d 1153, 1157–58(Nev. 2004)(quoting *Farmers Ins. Group v. Stonik*, 867 P.2d
 8 389, 391(Nev. 1994)). The court “will not rewrite contract provisions that are otherwise
 9 unambiguous or increase an obligation to the insured where such was intentionally and
 10 unambiguously limited by the parties.” *Id.*

11 The duty to defend is a broad duty of the insurer to defend an insured that arises when there
 12 are facts alleged that give rise to the potential of liability under the policy. See *United Nat'l*, 99
 13 P.3d at 1158. “If there is any doubt about whether the duty to defend arises, this doubt must be
 14 resolved in favor of the insured.” *Id.* However, “the duty to defend is not absolute” and “a
 15 potential for coverage only exists when there is arguable or possible coverage.” *Id.* (citations
 16 omitted). The court must compare the allegations of the complaint with the terms of the policy to
 17 determine if there is a duty to defend. *Id.* The duty to indemnify, in contrast, only arises in the
 18 event of final placement of covered, non-excluded liability upon the insured through judgment or
 19 settlement. *Associated Aviation Underwriters, Inc. v. Vegas Jet, L.L.C.*, 106 F.Supp.2d 1051
 20 (D.Nev. 2000).

21 **2. Analysis**

22 Beasley claims entitlement to coverage under the “personal and advertising” provisions of
 23 the Insurance Agreement. The coverage is provided as follows:

24 ///

25 ///

1 A. Coverages

2 1. Business Liability.

3 a. We will pay those sums that the insured becomes legally
4 obligated to pay as damages because of “bodily injury”, “property
5 damage” or “personal and advertising injury” to which this insurance
6 applies. We will have the right and duty to defend the insured
7 against any “suit” seeking those damages

8 b. This insurance applies:
9 ...
10 (2) To “personal and advertising injury” caused by an offense arising
11 out of your business, **but only if the offense was committed** in the
12 “coverage territory” **during the policy period.**

10 (Insurance Agreement, at p. 22 of 35 of agreement.)

11 The wrongs alleged in the Complaint happened before the Insurance Agreement took effect
12 on July 7, 2009. Specifically, the Complaint alleges that “Ms. Beasley induced at least a dozen
13 American Family policyholders to transfer their insurance business from American Family to
14 Insurance Outlet from February through March 2009. (Comp. at ¶32.) Thus, it is clear under the
15 terms of the Insurance Agreement that American Family does not have a duty to defend against
16 the policy manipulation claims because they occurred before the effective date of the Insurance
17 Agreement.

18 Beasley argues that since the suit was not filed until November 30, 2010 it creates an issue
19 of fact as to when the alleged acts actually occurred. Beasley also asserts that American Family
20 must explain how the alleged activities ceased by July 8, 2009 when the Insurance Policy became
21 effective and the claims that the Complaint contemplates ongoing injury.

22 The Court must look to the terms of the contract and the complaint to determine if there is
23 a duty to defend. *United Nat'l*, 99 P.3d at 1158. Although the Complaint does contemplate
24 ongoing injury, the alleged incidents that caused the injury are the stealing of the business records
25 and soliciting American Family customers that happened before the date of the Insurance

1 Agreement. Therefore, the Insurance Agreement does not cover the time period in question and
2 American Family has no duty to defend.

3 In the alternative, the Court also finds Beasley's alleged activities do not fall under the
4 definition of "advertising injury." The Insurance Agreement defines "personal and advertising
5 injury" as follows:

6 [an] injury, including consequential "bodily injury", arising out of one or more
7 of the following offenses:
8 . . .
9 f. The use of another's advertising idea in your "advertisement"; or
g. Infringing upon another's copyright, trade dress or slogan in your
advertisement.

10 (Insurance Agreement, at p. 32 of 35 of agreement.) The phrase "advertisement," as used in
11 subsections (f) and (g), means:

12 a notice that is broadcast or published to the general public or specific market
13 segments about your goods, products or services for the purpose of attracting
customers or supporters. For the purposes of this definition:

- 14 a. Notices that are published include material placed on the Internet or
15 on similar electronic means of communication; and
16 b. Regarding web-sites only that part of a web-site that is about your
17 goods, products or services for the purposes of attracting customers or
supporters is considered an advertisement.

18 (Insurance Agreement, at p. 31 of 35 of agreement.)

19 Beasley argues that the alleged claims against her and Insurance Outlet directly implicate
20 her advertising ideas and styles of business as the improper means that resulted in the "stealing"
21 of American Family clients. Beasley claims that since it used Thompson's telephone and fax
22 number to do business with potential clients this amounts to an advertising injury.

23 Courts construing similar provisions of commercial general liability (CGL) insurance
24 policies have distilled a three part test to determine if there is an advertising injury: (1) the suit
25 must have alleged a cognizable advertising injury; (2) the infringing party must have engaged in

1 advertising activity; and (3) there must have been some causal connection between the advertising
 2 injury and the advertising activity. *See State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226,
 3 1231 (11th Cir. 2004)(setting forth the three-part test); *Travelers Indem. Co. v. Walker & Zanger,*
 4 *Inc.*, 221 F.Supp. 2d 1224, 1232 (S.D. Cal. 2002)(citing *Peerless Lighting Corp. v. American*
 5 *Motorists Ins. Co.*, 98 Cal. Rptr. 2d 753, 760–61(Cal. App. 1st Dist. 2000)); *see also Associated*
 6 *Aviation Underwriters*, 106 F.Supp. 2d at 1055.

7 Beasley’s arguments fail under the first prong of the test. American Family’s allegations
 8 do not give rise to an “advertising injury.” The phrase “advertising idea” refers to an “advertising
 9 concept or plan for an advertising campaign.” *EKCO Group, Inc. v. Travelers Indem. Co.*, 273
 10 F.3d 409, 413 (1st Cir. N.H. 2001). It is an “idea for calling public attention to a product or
 11 business, especially by proclaiming desirable qualities so as to increase sales or patronage.” *Frog,*
 12 *Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3d Cir. 1999)(quoting *Atlantic Mut.*
 13 *Ins. Co. v. Badger Med Supply Co.*, 528 N.W.2d 486, 490 (Wis. Ct. App. 1995)). While a
 14 symbol, slogan, or method of advertising can be an advertising idea, courts have found that a
 15 confidential customer list is a trade secret not an advertising idea. *See Steinberg*, 393 F.3d at 1234.

16 The Ninth Circuit addressed the applicability of the “misappropriation of advertising ideas
 17 or style of doing business” clause in a CGL policy’s advertising injury coverage in *Sentex*
 18 *Systems, Inc. v. Hartford Accident & Indemnity Co.*, 93 F.3d 578 (9th Cir. 1996)(applying
 19 California law). In *Sentex*, the court affirmed a district court’s holding that the insurer had a duty
 20 to defend its insured under the “misappropriation of advertising ideas or style of doing business”
 21 clause where the underlying complaint alleged that the insured had induced a third party to breach
 22 a non-competition agreement with the underlying plaintiff company, to misappropriate its “trade
 23 secrets, including customer lists, marketing techniques, and other inside and confidential
 24 information” and, together with the insured, to solicit the underlying plaintiff’s customers. *Id.* at
 25 579–80. However the court stated that the misappropriation of a customer list alone would not

1 trigger coverage under the language of the policy. *Id.* at 581.

2 The Eleventh Circuit found no duty to defend on facts similar to this case in *Steinberg*.
 3 The underlying plaintiff sued the insured for stealing a confidential customer list and database,
 4 and using it to unfairly compete with the plaintiff. *Steinberg*, 393 F.3d at 1232–34. The insured
 5 sought coverage under a provision that applied to “misappropriation of advertising ideas or style
 6 of doing business.” *Id.* at 1228. The court ruled that the provision was inapplicable because use of
 7 a customer list is not an “advertising idea”:

8 [T]he alleged misappropriation of a confidential customer list cannot, under
 9 accepted principles of insurance contract construction, be held to fall within the
 10 policy language regarding misappropriation of . . . “advertising ideas” A
confidential customer list is a trade secret, not an idea about advertising . . .
 11 . . . Without relevant, attendant allegations pertaining to advertising, no
 12 coverage under a “misappropriation of advertising ideas . . .” theory is
 available.

13 *Id.* at 1234 (emphasis added).

14 While no published Nevada decision has addressed whether or not the misappropriation of
 15 a customer list qualifies as an “advertising ideas” this Court believes that Nevada would agree
 16 with the 11th Circuit.² Therefore, this court finds that the alleged act of misappropriation of
 17 customer lists and related causes of actions do not allege an “advertising injury.” The first prong
 18 of the test is not satisfied and there is no duty to defend. “Likewise, these factors in turn negate
 19 any future duty to indemnify.” *Associated Aviation Underwriters*, 106 F.Supp.2d at 1056.

20 Without a duty to defend, there can be no breach of contract as alleged by Beasley. Counts
 21 two, three, and four all relate to the contract at issue and contain allegations that American Family
 22 has a duty to defend or have not lived up to their contractual obligations. As the Court has found
 23

24 ² In the absence of state law on point, “[t]he court must predict how the Nevada Supreme Court would decide this issue ‘using
 25 intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.’”
Great Am. Ins. Co. v. N. Am. Specialty Ins. Co., 542 F. Supp. 2d 1203, 1211 (D. Nev. 2008) (quoting *Arizona Elec. Power Co-op v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995)).

1 that there is no duty to defend, these causes of action must fail. Beasley's request for declaratory
2 relief, however, is related to all of the counterclaims and therefore, it will not be dismissed.

3 **C. Motion for Summary Judgment**

4 Beasley moves for summary judgment on the basis that American Family has breached the
5 contract because it refuses to defend and indemnify Beasley in this suit. For the reasons stated
6 above, the Court has determined that American Family does not have a duty to defend and
7 indemnify. Accordingly, Beasley's motion is DENIED.

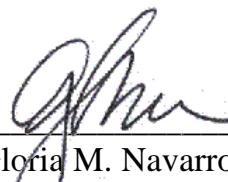
8 **CONCLUSION**

9 **IT IS HEREBY ORDERED** that American Family's Motion to Strike (ECF No. 13) is
10 **GRANTED**. Beasley shall file an Amended Answer by **February 21, 2012**. **Failure to do so**
11 **will result in the allegations being construed as ADMISSIONS.**

12 **IT IS FURTHER ORDERED** that American Family's Motion to Dismiss (ECF No. 14)
13 is **GRANTED in part and DENIED in part**. Beasley's First, Second, Third, and Fourth Causes
14 of Action are **DISMISSED**.

15 **IT IS FURTHER ORDERED** that Beasley's Motion for Summary Judgment (ECF No.
16 23) is **DENIED**.

17 **DATED** this 6th day of February, 2012.

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Gloria M. Navarro
United States District Judge
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